U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

DATE: February 18, 1998

CASE NO. 96-INA-368

In the Matter of:

DR. TARLOCHAN S. BHATAL,
Employer.

on behalf of

KAMALA WIJESINGHE,
Alien.

Before: Burke, Lawson and Vittone
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5) of the Immigration and Nationality Act, 8 U.S.C.§1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

This decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file and any written arguments. 20 C.F.R. § 656.27 (c).

STATEMENT OF THE CASE

The Employer in this case has filed an application (ETA 750A) seeking the certification of the permanent employment of the Alien as a Live-in Household Cook with the following duties:

> Plan menus and cook meals according to recipes and taste of Employer: plan weekly menus and go food shopping; clean kitchen and cooking utensils; prepare and serve meals; prepare dietary foods as and when required by the Employer.

(AF 39-40).

The Hours of work were listed on the ETA 750A, as amended, as 44 per week with overtime as needed. No formal education or training were required but successful applicants were required to have two years experience in the job offered.

The ETA 750A was accompanied by the following statement signed by the Employer:

> This letter is submitted in support of the application for certification on behalf of Kamala Wijesingha for the position of live-in cook.
>
> I am a medical practitioner of anesthesia. My wife is also a medical practitioner of psychiatry. Both of us work long hours and our schedules are very demanding. We are unable to take care of our home without the assistance of a live-in cook and it is an absolute business necessity that we employ someone on a live-in basis.
>
> In addition, we entertain in our home and we travel extensively for business reasons. The business schedules and professional commitments of myself and my wife do not permit any one of us to attend to our household needs. We must therefore rely on a cook on a live-in basis to ensure that our home is looked after and our meals are prepared as we are unable to meet these demands.
>
> Day workers have proven unsatisfactory as they are unwilling to remain overtime when are called upon to work late and we must always rely on the services of a cook to help us. It has therefore become an absolute business necessity that we employ a cook on a live-in basis. It is therefore respectfully requested that you approve her application on behalf of the Bhathal family.

(AF 1).

Only one applicant responded to the Employer's advertisement for the position. He reportedly failed to keep an appointment for an interview (AF 31).

Following receipt of the file from the State job agency, the CO issued a Notice of Findings (NOF) in which she proposed to deny certification on the grounds that the Employer had neither established that the position is full-time and permanent as required by §656.50, re-codified at §656.3, of the regulations nor that the live-in requirement is based on business necessity as required by §656.21(b)(2)(i). (AF 44-48). The Employer was informed that he could rebut the finding in regard to the position being full-time by:

> a. amending the job duties; or,
>
> b. submitting evidence that the requirement arises from a business necessity rather than employer preference or convenience and is customary to the employer.

> To establish business necessity under 656.21 (b)(2)(i), an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and is essential to perform the job in a reasonable manner.

(AF 47).

The CO specified that such evidence must include such items as the number of meals prepared daily and the individuals for whom the worker is cooking on a daily basis; a detailed schedule of entertaining over the previous 12 months including number of meals served, time and duration of each meal, etc.; receipts for any entertaining at restaurants over the previous 12 months; a listing of any other duties the worker will be required to perform; copies of tax and/or social security returns for any full-time cooks employed in the past; documentation as to who is currently performing cooking and general household maintenance duties; and a description of child care arrangements for any pre-school or school age children living in the household.

In regard to the live-in requirement, the CO specified that this could also be rebutted by deleting the requirement or establishing business necessity for the same in the following manner:

> Employer must provide evidence clearly establishing that the live-in requirement is necessary and essential to this household, without which the employer would be unable to run the residence; please provide your specific entertainment and work schedule for the past two months, giving details, i.e., names of clients and guests, purpose of entertainment, dates, times, places, etc.

(AF 45).

The Employer's rebuttal (AF 49-62) to the NOF consisted of the following statement:

> (1) Number of meals prepared daily - 3 to 4.
>
> (2) Length of time required for each meal - Breakfast 1 to 1 ½ hours, Lunch 2 hours, Dinner 2 to 2 ½ hours (more when entertaining is done) and 1 - 1 ½ hours for snacks, etc.
>
> (3) Individuals for whom meals are prepared - Head of house, spouse, and children
>
> (4) Entertainment schedule is attached.
>
> (5) The worker will not be required to perform any duties other than cooking.
>
> (6) Current household duties are being performed by relatives and family friends.

The daily work schedule are as follows:

Husband - standard work hours 8:30 - 5:30 pm but works late depending on patient care. Wife - 7:30 - 5:00 pm - works late depending patient care.

The children's work schedule are as under:

Tenafly HS - 8:00 - 4:30 pm
Today's learning center (Care center) 8:00 - 5:00 pm

Please note that the Cook is not involved in the caring of children as they are able to fend for themselves.

The job requirements are indicated meeting the precise terms of such requirements and the minimum requirements are justified by business necessity and they are neither unduly restrictive nor excessive as they are essential. The same requirements advance our legitimate business objectives and related to the nature of the job opportunity described in the offer. Our ability to perform within a very strict business environment often depends upon the employee's services.

It is virtually impossible to find suitable day workers in the area of employment. Our business commitments outside the home and the peculiar circumstances of the household though absent of childcare should be considered. The inability to predict long work hours and regular entertainment in the household are essential elements in having a worker on a live-in basis. The requirement of live-in Cook is essential and is neither a convenience nor a preference but a strict business necessity.

The Entertainment Schedule included with the rebuttal covered the prior two months and listed 24 occasions when named guests were present at dinner meetings.

The rebuttal was accompanied by a submission from the Employer's counsel in which he set forth various arguments as to why certification should be granted including the following:

The job opportunity described in the application is a full time, permanent job position where the worker is called upon to perform job duties to a minimum of forty hours per week. There are instances the worker may work more than forty hours a week, in which case the worker will be adequately compensated as per regulations.

The job position may or may not comprise of daily duties that would encompass the 40 hour work schedule in its entirety but the duties, work load and time factor warrants the hiring of a worker on a permanent full time basis."

The CO issued a Final Determination denying certification on both grounds raised in the NOF (AF 63-66). Regarding the full-time employment issue, the CO found, in substance, that the Employer had not adequately documented his entertainment schedule in that he provided the same for only two months and did not include the time and duration of the meals. She found also that the Employer had not provided evidence that he had employed full-time cooks in the past and had not documented the use of restaurants. Concerning the live-in requirement, the CO again found that the entertainment schedule was inadequate because the hours of entertainment was not provided nor was it evident from the documentation that food was prepared for each engagement.

The CO went on to note:

> In addition, attorney's/employer's rebuttal indicates on page two (2) that 'the worker is called upon to perform job duties for a minimum of forty hours per week' and 'the position may or may not comprise of daily duties that would encompass the 40 hour work schedule.' In general, the minimum total hours per week to support a live-in requirement is forty-four hours. Employer's statement further supports our position that it is not apparent that the live-in requirement is essential rather than an employer preference.

The Employer has requested a review of the denial and the record has been submitted to the Board for such purpose.

DISCUSSION

According to §656.3 of the regulations --

> "Employment" means permanent full-time work by an employee for an employer other than oneself.

The Board has held that an employer bears the burden of proving that a position is permanent and full-time. If the employer's own evidence does not show that the position is permanent and full time, certification may be denied. *Gerata Systems America, Inc.*, 88-INA-344 (Dec. 16, 1988). Thus, if a CO reasonably requests specific information to aid in the determination of whether a position is permanent and full-time, the employer must provide it. *Collectors International, Ltd.*, 89-INA-133 (Dec. 14, 1989).

Pursuant to §656.21 (b)(2)(iii) of the regulations, in instances where a worker is required to live on the employer's premises, the employer shall document adequately that the requirement is a business necessity. In *Marion Graham*, 88-INA-102 (Mar. 14, 1990) (*en banc*) the Board held that in cases involving live-in domestic workers to establish business necessity for a live-on-the-premises requirement, the employer must demonstrate that the requirement is essential to perform, in a reasonable manner, the job duties as described by the employer. The relevant business for applying the business necessity test under such circumstances is the "business" of

running the employer's household. Pertinent factors in determining whether the live-in requirement is essential to the reasonable performance of the job duties include the employer's occupation outside the home, the circumstances of the household itself, and any extenuating circumstances. The Board held further in *Graham* that in order for an employer's written assertions to be considered documentation, they generally should be specific enough to enable a CO to determine whether there are cost effective alternatives to a live-in requirement and whether the needs of a household for a live-in worker are genuine.

Pursuant to §656.25(c) if a CO does not grant certification a NOF must be issued and must include the specific grounds for issuing the NOF. The Board has held that the NOF must give notice which is adequate to provide the Employer an opportunity to rebut or cure the alleged defects. *Downey Orthopedic Medical Group*, 87-INA-674 (Mar. 16, 1988) (*en banc*). The NOF must specify what the employer must show to rebut or cure the CO's findings. *Potomac Foods, Inc.*, 93-INA-309 (July 26, 1994). The Board has held further that a confusing NOF, which includes citation of an erroneous standard, requires a remand for corrective action. *Sage Brown & Assoc.*, 91-INA-318 (June 29, 1992).

A Final Determination must discuss the employer's rebuttal evidence and argument and the matter may be remanded if it fails to adequately address pertinent evidence or arguments. *Hollywood Auto Sales*., 93-INA-123 (Oct. 27, 1994). Additionally, a CO can not raise an issue for the first time in a Final Determination. *Marathon Hosiery Co., Inc.*, 88-INA-420 (May 4, 1989) (*en banc*). If evidence received with the rebuttal raises a new issue, a supplemental NOF must be issued. *Shaw's Crab House*, 87-INA-714 (Sept. 30, 1998) (*en banc*).

Based on the above principles, the Board finds both the NOF and Final Determination to be defective in the instant case. Both the NOF and the FD clearly cite an erroneous standard for establishing that the position is full-time and permanent; that is, arises from a business necessity. Nowhere in the regulations or the holdings of this Board has a "business necessity" standard been applied in determining that the job offered is full-time compliance with §656.3. Thus, even though the types of evidence called for in the NOF, as being needed to rebut this issue, do not relate necessarily to "business necessity," reference to this standard creates confusion and denies due process.

We recognize that the Employer's rebuttal evidence perhaps did not measure up to the detail expected by the CO. Nevertheless, we must conclude that the inaccurate and confusing NOF contributed to this situation. Accordingly, the Board will order that this matter be remanded to the CO for corrective action. A supplemental NOF should be issued which should set forth the correct standards for each issue raised therein. "Canned" language should be avoided and the NOF should be directed toward the Employer's particular employment situation and other factors as well as any entertainment needs. We note in this regard that the Employer has indicated that the location of his residence may have some bearing on his inability to employ a live-out worker. He should be permitted the opportunity to clarify this contention.

ORDER

The Certifying Officer's denial of labor certification is hereby VACATED and this matter is ORDERED to be REMANDED for the corrective action noted herein.

SO ORDERED.

for the panel:

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JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1)n when full Board consideration is necessary to secure or maintain uniformity in its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.